



2004

Annual Report

On the Use of Electronic Surveillance

As Required Under Section 195
of the *Criminal Code of Canada*
Prepared by the
Ministry of the Attorney General for Ontario



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I. Introduction

This Report, prepared pursuant to the provisions of s. 195 of the *Criminal Code of Canada* (“*Code*”), sets out statistical data in respect of the following two forms of judicially authorized interceptions:

- (a) authorizations issued by a judge of the Ontario Superior Court of Justice pursuant to s. 186 of the *Code* for the interception of private communications, and
- (b) warrants issued by a judge of the Ontario Superior Court of Justice pursuant to s. 487.01(1) of the *Code*, authorizing peace officers to observe by means of a television camera or other similar electronic device any person engaged in activity in circumstances in which the person has a reasonable expectation of privacy.¹

Bearing in mind the requirements of s. 195 of the *Code*, this Report does not address the frequency of interceptions pursuant to ss. 184.1 (Interception to Prevent Bodily Harm), 184.2 (Interception with Consent), or 184.4 (Interception in Exceptional Circumstances) of the *Code*. While s. 195 sets out a reporting requirement in relation to emergency authorizations issued under s. 188 of the *Code*, there were no such authorizations in the year 2004.

For ease of reference, s. 195 of the *Code* is set out in full below.

▪ Section 195 of the *Criminal Code of Canada*

Annual report

195. (1) The Minister of Public Safety and Emergency Preparedness shall, as soon as possible after the end of each year, prepare a report relating to

- (a) authorizations for which he and agents to be named in the report who were specially designated in writing by him for the purposes of section 185 made application, and
- (b) authorizations given under section 188 for which peace officers to be named in the report who were specially designated by him for the purposes of that section made application,

and interceptions made thereunder in the immediately preceding year.

¹ Reporting requirements only relate to video-warrants that do not involve consenting parties.

Information respecting authorizations

(2) The report referred to in subsection (1) shall, in relation to authorizations and interceptions made thereunder, set out

- (a) the number of applications made for authorizations;
 - (b) the number of applications made for renewal of authorizations;
 - (c) the number of applications referred to in paragraphs (a) and (b) that were granted, the number of those applications that were refused and the number of applications referred to in paragraph (a) that were granted subject to terms and conditions;
 - (d) the number of persons identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of
 - (i) an offence specified in the authorization,
 - (ii) an offence other than an offence specified in the authorization but in respect of which an authorization may be given, and
 - (iii) an offence in respect of which an authorization may not be given;
 - (e) the number of persons not identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of
 - (i) an offence specified in such an authorization,
 - (ii) an offence other than an offence specified in such an authorization but in respect of which an authorization may be given, and
 - (iii) an offence other than an offence specified in such an authorization and for which no such authorization may be given,
- and whose commission or alleged commission of the offence became known to a peace officer as a result of an interception of a private communication under an authorization;
- (f) the average period for which authorizations were given and for which renewals thereof were granted;

- (g) the number of authorizations that, by virtue of one or more renewals thereof, were valid for more than sixty days, for more than one hundred and twenty days, for more than one hundred and eighty days and for more than two hundred and forty days;
- (h) the number of notifications given pursuant to section 196;
- (i) the offences in respect of which authorizations were given, specifying the number of authorizations given in respect of each of those offences;
- (j) a description of all classes of places specified in authorizations and the number of authorizations in which each of those classes of places was specified;
- (k) a general description of the methods of interception involved in each interception under an authorization;
- (l) the number of persons arrested whose identity became known to a peace officer as a result of an interception under an authorization;
- (m) the number of criminal proceedings commenced at the instance of the Attorney General of Canada in which private communications obtained by interception under an authorization were adduced in evidence and the number of those proceedings that resulted in a conviction; and
- (n) the number of criminal investigations in which information obtained as a result of the interception of a private communication under an authorization was used although the private communication was not adduced in evidence in criminal proceedings commenced at the instance of the Attorney General of Canada as a result of the investigations.

Other information

(3) The report referred to in subsection (1) shall, in addition to the information referred to in subsection (2), set out

- (a) the number of prosecutions commenced against officers or servants of Her Majesty in right of Canada or members of the Canadian Forces for offences under section 184 or 193; and
- (b) a general assessment of the importance of interception of private communications for the investigation, detection, prevention and prosecution of offences in Canada.

Report to be laid before Parliament

(4) The Minister of Public Safety and Emergency Preparedness shall cause a copy of each report prepared by him under subsection (1) to be laid before Parliament forthwith on completion thereof, or if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

Report by Attorneys General

(5) The Attorney General of each province shall, as soon as possible after the end of each year, prepare and publish or otherwise make available to the public a report relating to

(a) authorizations for which he and agents specially designated in writing by him for the purposes of section 185 made application, and

(b) authorizations given under section 188 for which peace officers specially designated by him for the purposes of that section made application,

and interceptions made thereunder in the immediately preceding year setting out, with such modifications as the circumstances require, the information described in subsections (2) and (3).

Note that s. 195(4) does not apply to provincial Attorneys General. Only the federal Minister of Public Safety and Emergency Preparedness shall cause a copy of the annual report to be laid before Parliament. Nonetheless, pursuant to s. 195(5), the Attorney General for each province shall prepare and publish “or otherwise make available to the public” the information required by virtue of s. 195 of the *Code*, with such modifications as required.

II. Overview to Part VI of the *Criminal Code*

Part VI of the *Criminal Code*, “Invasion of Privacy”, represents an almost entirely self-contained statutory scheme that governs the use by law enforcement of electronic surveillance. It sets out the means by which authorizations for electronic surveillance may be obtained and the circumstances in which this investigative technique may be used without resort to judicial authorization. Among other provisions, Part VI also includes a definitional section,² an offence provision,³ reference to procedural matters, such as the sealing of application materials,⁴ notice,⁵ and disclosure provisions.⁶

As it relates to the actual interception of private communications, barring urgent circumstances (as governed by s. 184.4 of the *Code*) or safety concerns (as governed by s. 184.1 of the *Code*), the police must seek judicial authorization before intercepting private communications. The term “private communication” is defined in s. 183 of the *Criminal Code* as follows:

“private communication” means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it

There are three types of applications contained in Part VI of the *Code* that may be brought for judicial authorization. They are sub-categorized below.

▪ **Interception With the Consent of One of the Parties to the Communication**

The first type of application falls under s. 184.2 of the *Code*. It allows a police officer to apply to a judge of either the provincial or superior court to authorize the interception of private communications where at least one of the people involved in the communication consents to its interception. An affidavit must be sworn in support of the application and a number of statutory criteria, as set out in s. 184.2, met. Section 195 does not require the Attorneys General to report on these consent authorizations.

² Section 183 of the *Code*

³ Section 184 of the *Code*

⁴ Section 187 of the *Code*

⁵ Sections 189 and 196 of the *Code*

⁶ Sections 193 and 193.1 of the *Code*

▪ Applications to Specially Appointed Judges in Urgent Circumstances

The second type of application falls under s. 188 of the *Code*. It is an application that is brought in urgent circumstances. This type of application to intercept private communications may only be made by a peace officer who is specially designated in writing, by name or otherwise, by the Minister of Public Safety and Emergency Preparedness (in the case of offences that may be instituted by the Government of Canada) or the Attorney General of a province (in the case of offences that may be prosecuted by a provincial Attorney General, typically criminal offences). Moreover, the application must be made to a specially designated judge, appointed from time to time by the Chief Justice. In Ontario, the “Chief Justice” is defined under s. 188(4)(a) as the “Chief Justice of the Ontario Court”.

In order to obtain a s. 188 authorization, the urgency of the situation must be such that an authorization could not be obtained, with reasonable diligence, pursuant to s. 186 of the *Code*. Nonetheless, s. 188 contemplates that a s. 186 authorization “could” issue, but for the urgency of the situation. This type of authorization may only issue for a period up to thirty-six hours.

Pursuant to s. 195(1)(b), information about these authorizations must be contained in the Annual Report of the respective Attorneys General and Minister of Public Safety and Emergency Preparedness.

▪ Applications for Third-Party Authorizations

The final type of application is governed by s. 185 of the *Code*. Authorizations granted in response to these applications are governed by s. 186 of the *Code*. Section 185 allows an application to be made, in the case of Ontario, to a judge of the Superior Court of Justice. The application may only be brought by the Attorney General of the province or the Minister of Public Safety and Emergency Preparedness or an agent specially designated in accordance with s. 185(1)(a) and (b) of the *Code*. In Ontario, a number of Crown Counsel are designated in writing by the Attorney General or Deputy Attorney General to bring s. 185 wiretap applications.

Agents may bring an application for an authorization to intercept private communications where the offence under investigation is a s. 183 designated offence. The applicant is determined by who has prosecutorial authority over the s. 183 offence. In Ontario, the Attorney General has prosecutorial authority in relation to all criminal matters and, in the result, most s. 185 applications relating to criminal offences contained in s. 183, are the subject of provincial applications. The Minister of Public Safety and Emergency Preparedness (or an agent on the Minister’s behalf) brings applications in respect of offences over which the Attorney General of Canada has prosecutorial authority. Sometimes, applications for authorizations include offences that involve both federal and

provincial matters and, thereby, engage the authority of both governments. In these situations, dual applications for a single authorization are brought by agents of both the federal and provincial governments.

An application for an authorization under s. 186 must be accompanied by an affidavit, sworn by a peace officer or public officer. It must depose to a number of factors set out in s. 185(1) (c-h). These factors include, but are not limited to, reference to the facts relied on to justify the belief that an authorization should be granted, the types of communications sought to be intercepted, the names, addresses and occupations of the people whose private communications there are reasonable grounds to believe may assist in the investigation of the offence, the period of time for which the authorization is requested and whether “investigative necessity” has been met. In respect of this latter requirement, the affiant must depose to the following:

s. 185(1)(h) - whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Note that pursuant to s. 185(1.1), the investigative necessity requirement need not be met in relation to criminal organization and terrorism offences.

Before granting the application, s. 186 requires that the judge be satisfied of the following:

186(1) An authorization under this section may be given if the judge to whom the application is made is satisfied

- (a) that it would be in the best interests of the administration of justice to do so; and
- (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Like s. 185(1.1), by virtue of s. 186(1.1), investigations into criminal organizations and terrorism offences are exempt from the investigative necessity requirement built into s. 186(1)(b) of the *Code*.

Sections 186(2) and (3) refer to the special circumstances surrounding the interception of private communications that may be the subject of solicitor-client privilege. Section 186(4) sets out a number of statutory requirements as it relates to the contents of the authorization. Importantly, s. 186(4)(e) allows an authorization to be valid for a period up to, but not exceeding, 60 days. Section 186.1 exempts authorizations from the sixty-day rule where

the subject of the investigation is a criminal organization or terrorism offence. In these circumstances, an authorization may continue for a period of up to one year in duration.

III. Video-Warrants:

Section 487.01 of the *Criminal Code*

The jurisdiction for a video-warrant resides in Part XV of the *Criminal Code*. Section 487.01 provides for a “general warrant” to allow a peace officer to “use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person’s property ...”.⁷ Within the general warrant provision is embedded specific reference to the use of video. For ease of reference, the provision is set out in full below:

Section 487.01: Information for General Warrant

Video surveillance

(4) A warrant issued under subsection (1) that authorizes a peace officer to observe, by means of a television camera or other similar electronic device, any person who is engaged in activity in circumstances in which the person has a reasonable expectation of privacy shall contain such terms and conditions as the judge considers advisable to ensure that the privacy of the person or of any other person is respected as much as possible.

Other provisions to apply

(5) The definition “offence” in section 183 and sections 183.1, 184.2, 184.3 and 185 to 188.2, subsection 189(5), and sections 190, 193 and 194 to 196 apply, with such modifications as the circumstances require, to a warrant referred to in subsection (4) as though references in those provisions to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which persons had reasonable expectations of privacy.

While the jurisdiction to grant a video-warrant is found in Part XV of the *Code*, by the adoption of significant aspects of Part VI of the *Code*, it operates, for all intents and purposes, as if it were located in Part VI. Significantly, among other provisions, s. 487.01(5) adopts ss. 184.2, 185, 186, 188 and 195. This means that all one-party consent (s. 184.2), third-party (ss. 185-186) and emergency (s. 188) applications for video-warrants are governed by the specific statutory criteria contained within the Part VI provisions. In the result, all video-warrants granted for electronic surveillance where there is no consenting party must be reported upon annually, subject to the criteria contained in s. 195 of the *Code*.

⁷ Section 487.01(1) of the *Code*.

IV. Statistics

From January 1 to December 31, 2004, 64 authorizations and/or video-warrants were issued from the Ontario Superior Court of Justice pursuant to ss. 186 and/or 487.01 of the *Code*.⁸ The following table places these 64 authorizations/warrants in the context of previous years:

Year	Number of Authorizations Issued
1981	149
1982	171
1983	155
1984	127
1985	132
1986	115
1987	82
1988	51
1989	50
1990	107
1991	103
1992	98
1993	81
1994	51
1995	76
1996	77
1997	73
1998	65
1999	48
2000	69
2001	58
2002	60
2003	57
2004	64

⁸ Note that video-warrants are most frequently sought in conjunction with an authorization under s. 186 of the *Code*. Where this occurs, depending on jurisdictional practice, an omnibus order is granted. In Ontario, in addition to granting the authorization to intercept private communications under s. 186 of the *Code* and to surreptitiously record by video under s. 487.01, among other things, omnibus orders often grant authority to install tracking devices (s. 492.1), install, maintain, remove and monitor number recorders (s. 492.2(1)), and seize copies of telephone records (s. 492.2(2)). In this Report, where a video-warrant is included as part of an omnibus order that grants an authorization under s. 186 of the *Code*, it is counted as a single authorization for purposes of the total number of authorizations for the year.

From January 1 to December 31, 2004, of these 64 authorizations, there were no free-standing video-warrants. Nonetheless, there were 10 video-warrants included with an authorization pursuant to s. 186 of the *Code*.

The 64 authorizations/warrants granted in 2004 related to 39 separate police investigations. Of the 39 police investigations conducted in 2004, 19 involved more than one authorization/warrant, as set out in the table below:

Number of Authorizations/Warrants obtained <i>per</i> investigation	Number of Investigations	Actual Number of Authorizations/Warrants
1	20	20
2	13	26
3	6	18
4	0	0
5	0	0
6	0	0
Total	39	64

Often, successive authorizations in respect of the same general matter under investigation are granted on different terms than the original authorization. Such subsequent authorizations typically vary from previous ones as to the named objects, the places of interception, the manner in which interceptions are permitted to occur and the enumerated offences. These changes correspond to the progress of the investigation as new information comes to light and as the focus of the inquiry expands or is narrowed. Where the police seek a subsequent authorization that reflects the changes in the investigation, incorporating, among other things, new parties, locations, terms and conditions, they require a new application under s. 185 and new authorization under s. 186. While s. 186(6)-(7) allows for an application to renew an authorization in the same form, these applications are rarely made, as the required parameters of an authorization will almost inevitably evolve over time.

For the purposes of this Annual Report, where multiple authorizations/warrants have been granted in respect of the same investigation, (even where they are not “renewals” under s. 186(6)-(7)) the relevant statistical data relating to the following areas identified in s. 195(2) have not been “*double counted*”:

- s. 195(2)(d): the number of persons identified in an authorization against whom proceedings were commenced
- s. 195(2)(e): the number of persons not identified in an authorization against whom proceedings were commenced

s. 195(2)(l): the number of persons arrested whose identity became known

s. 195(2)(a)	The number of applications made for authorizations.	64
(b)	The number of applications made for renewal of authorizations. ⁹	0
(c)	(i) The number of applications referred to in paragraphs (a) and (b), above, that were granted.	64
	(ii) The number of applications referred to in paragraphs (a) and (b), above, that were refused. ¹⁰	0
	(iii) The number of applications referred to in paragraphs (a) and (b), above, that were granted subject to terms and conditions.	64
s. 195(2)(d)	The number of persons identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Ontario in respect of:	
(i)	An offence specified in the authorization;	135
(ii)	An offence other than an offence specified in the authorization but in respect of which an authorization may be given;	50
(iii)	An offence in respect of which an authorization may not be given.	32
s. 195(2)(e)	The number of persons <u>not</u> identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Ontario in respect of:	
(i)	An offence specified in such an authorization;	27
(ii)	An offence other than an offence specified in such an authorization but in respect of which an authorization may be given;	33
(iii)	An offence other than an offence specified in such an authorization and for which no authorization may but given;	20
	and whose commission or alleged commission of the offence became known to a peace officer as a result of an interception of a private communication under an authorization.	
s. 195(2)(f)	The average period of days for which authorizations were given.	56

⁹ For purposes of the Annual Report, “renewal” is interpreted to mean an application governed by s. 186(6)-(7) of the *Code*.

¹⁰ It should be noted that, for purposes of the Annual Report, a refusal is considered to occur where an application for an authorization is made to a judge, is refused, and is never granted. This is to be distinguished from a situation where an application is made to a judge, refused on the basis that the judicial officer may not be satisfied on a certain basis, which is later remedied, at which point the application is granted.

s. 195(2)(g)	The number of Authorizations that by virtue of one or more renewals thereof were valid:	
	For more than 60 days;	0
	For more than 120 days;	0
	For more than 180 days;	0
	For more than 240 days.	0

s. 195(2)(h) The number of persons given notifications pursuant to s.196. 927

s. 195(2)(i)	The offences in respect of which authorizations were granted:	
s.96	Possession of weapon obtained by commission of offence	2
s.99	Weapons trafficking	9
s.100	Possession for purpose of weapons trafficking	4
s.121	Fraud on government	3
s.122	Breach of trust	6
s.132	Perjury	3
s.139	Obstructing justice	6
s.145(1)	Escape, etc.	1
s.201(1)	Keeping gaming or betting house	3
s.202(1)(e)	Pool-selling, etc.	4
s.235	Murder	49
s.239	Attempt murder	3
s.240	Accessory after the fact murder ¹¹	1
s.267	Assault with a weapon or causing bodily harm	1
s.268	Aggravated assault	4
s.271	Sexual Assault	4
s.279	Kidnapping	1
s.334	Theft	1
s.342	Theft, forgery, etc. of credit card	4
s.344	Robbery	8
s.354	Possession of property obtained by crime	5
s.367	Forgery	2
s.380	Fraud	3
s.464	Counselling to commit murder	3
s.465	Conspiracy to commit murder	3
s.467.11	Participation in a criminal organization	1
s.467.12	Commission of offence for criminal organization	1

¹¹ Where there is a non-designated s.183 offence appearing on the list, such as this s.240 offence, typically it is because it is accompanied in the order by another designated s.183 offence.

s.467.13	Instructing commission of offence for criminal organization	1
s. 195(2)(j)	A description of all classes of places and devices specified in the authorization and the number of Authorizations in which each such class of place was specified:	
	Residences	363
	Commercial Establishments	39
	Vehicles	58
	Correctional Institutions	70
	Other	224
s. 195(2)(k)	A general description of the methods of interception involved in each interception under an authorization:	
	Room Probes	62
	Telecommunications	649
	Bodypacks	37
	Other	503
s. 195(2)(l)	The number of persons arrested whose identity became known to a peace officer as a result of an interception under an authorization.	48
s. 195(2)(m)	The number of criminal proceedings ¹² commenced at the instance of the Attorney General of Ontario in which private communications obtained by interception under an authorization were adduced in evidence:	113
	The number of such proceedings that resulted in a conviction;	61
	The number of proceedings commenced but not yet completed. ¹³	36
s. 195(2)(n)	The number of criminal investigations in which information obtained as a result of the interceptions of a private communication under an authorization was used although the private communication was not adduced in evidence in criminal proceedings commenced by the Attorney General of Ontario as a result of the investigation.	40
s. 195(3)(a)	The number of prosecutions commenced against officers or servants of Her Majesty in right of Canada or members of the Canadian Forces for offences under section 184 or 193.	0

¹² To be clear for purposes of this Report, a “proceeding” is defined as a trial and/or a preliminary inquiry. Any given proceeding can include more than one accused.

¹³ This figure for 2004 will likely decrease and will be updated in future reports as the outstanding proceedings are completed.

V. Assessment of the Utility of Intercepting Private Communication

Pursuant to s. 195(3)(b) of the *Criminal Code*, the Annual Report must provide a “general assessment of the importance of interception of private communications for the investigation, detection, prevention and prosecution of offences in Canada”. The interception of private communications is, undoubtedly, one of the most valuable investigative tools available to law enforcement agencies. This investigative technique is available in only the most serious investigations where detailed statutory criteria have been met. Two of those criteria include that the application judge must be satisfied that it is in the best interests of the administration of justice that the order issue and that investigative necessity has been met.

Where these statutory criteria are met, the interception of private communications can lead to the identification of extremely dangerous people and provide evidence that would not otherwise be available. This is especially true in the case of criminal and terrorist organizations, which are not susceptible to penetration by undercover operatives or state agents.

Not only can authorizations to intercept private communications lead to the identification of those who present serious safety risks to the public, but they can also glean invaluable evidence used to prosecute those individuals. They also provide significant information that can be used to advance an investigation, even if that information is not of any evidentiary value. Interceptions of private communications also assist in preventing crime and, indeed, saving lives, as the interception of communications sometimes allow the police to respond to situations before or while they are occurring.

Electronic surveillance remains critically important to the public interest and the administration of justice in the Province of Ontario.

Appendix A

Section 195(1)(a) requires that the agents who made applications for purposes of s. 185 and s. 487.01 of the *Code* be named in the Annual Report. They are as follows:

John Alexander
Andrew Bell
Natalino Bernardon
Ronald Brooks
Lee Burgess
Harold Dale
Philip Enright
Michal Fairburn
Bruce Griffith
Denis Harrison
Mark Holmes
Brian Holowka
Charon Kerr
Lorne McConnery
Paul McDermott
Ann Morgan
Brian O'Marra
Mark Saltmarsh
John Scott
John Scutt
Steven Sherriff
Paul Tait
Sandy Tse

Appendix B

Section 195(1)(b) requires that the peace officers who made application under urgent circumstances for an authorization pursuant to s. 188 of the *Code*, be named in the Annual Report. As there were no s. 188 applications in the year 2004, no names are provided.

Ministry of the Attorney General
Crown Law Office – Criminal
Toronto, Ontario
